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THE COURTS AND THE PEOPLE.

The Constitution of the United States was adopted by the Legislatures of the several States, and this method was probably the nearest practicable approach to a referendum. The Constitution of each State, however, is an absolute referendum. Though it is constantly assumed that every law enacted by the Legislature which the courts have declared unconstitutional embodied the purpose of the citizens, the very opposite is the case; for as the State Constitution was ratified by the people as the expression of their permanent intention, any law which is repugnant thereto or subversive thereof cannot but be contrary to the popular will.

The Constitution as the only law submitted to the voter at the polls is thus placed above all legislation. When, therefore, it is opposed to the statute law enacted by the Legislature, to whom the people have temporarily delegated the function of the lawmaking power, it must prevail. With this in mind it becomes clear that whenever the Legislature passes a law which is unconstitutional, and whenever the executive sanctions such law by his signature, they violate their sworn obligations to keep within the limits which the people have prescribed.

The Constitution, whether state or national, is a growth, the result of calm deliberation and of long experiment, a crystallization of national custom, a historical evolution. Adopted with the realization of past failures and of future tendencies, it is invested with such checks and balances as will safeguard its spirit and conserve its intention. It is for this reason that the judicial functions of construction and of interpretation are to be jealously maintained. And though in moments of excitement, fomented by public agitators, there have been sporadic flashes of disapproval, a glance at our history will reveal the persistent fact that every constitutional convention in every state in this country has not only confirmed the

powers of the judicial department, but has vindicated the courts by adding limitation after limitation to the legislative. Present in most constitutions by implication, the place of the judiciary as the guardian of the law is expressly reserved in others. Thus Article I, Section 4, Paragraph 2 of the Constitution of the State of Georgia provides: "Legislative acts in violation of this Constitution or the Constitution of the United States are void and the judiciary shall so declare them."

Furthermore, the courts have never sought to substitute the judicial for the legislative. Within its legitimate sphere the Legislature is supreme, beyond the control of the judiciary; but if it transcend its inherent limits the courts can and should annul such encroachment. It is for them to see that the two other departments of government, which alone are clothed with political powers, keep within the law. Surely the example of an executive or of a legislature overstepping the prescribed constitutional limits is not calculated to produce that respect for the laws in the individual on which the safety and the stability of the government depends.

I would think it altogether unnecessary to discuss the function of the judicial department, were it not apparent that the public is at present sadly confused by the animadversions of those who should know better. It seems to be forgotten that the courts can consider only such cases as come before them; that a delegated power cannot be redelegated save by the people themselves; that it is the sworn duty of the judiciary, as the sentinel stationed to warn us of the armies of aggression, to conform to the unmistakable letter of the Constitution; that the courts have no jurisdiction over the executive and the legislative as such, but only in a controversy involving individual rights; that the spirit of a Constitution must be interpreted in the light of history, custom and tradition, and not according to partisan expectation, and that the judiciary is the only department of our government which has not transcended its original limitations.

To reiterate such things as these seems therefore necessary. And now, when the very function of the courts is questioned and when their existence as a co-ordinate branch of the government is subtly assailed, it is well also to remember that the independence of the judiciary is the sole guarantee of national permanence. Upon the courts' interpretation of the Constitution, conceived in the spirit of uniformity; upon their decisions, in the larger view of universal application, depend every right of person and of

property. Where else is our protection against special legislation? Where our defence against some possible irresponsible executive, who, actuated by ambition or incited by the hope of popular applause, may so obstruct the settled course of justice that the inalienable right of the person and of property, to protect which is the sole function of government, will be no longer secure? However, it is not the judiciary as individuals which limits the executive, but the judiciary as the exponent of the Constitution. It is not the power of the government which is unbounded, but that of the individual to do everything not forbidden by law. The government exists by equilibrium. To avoid the concentration of power at one point, the Constitution provided three co-ordinate branches of government. The courts, as the only counterpoise to an overgrown executive and to a precipitate Legislature, must declare the inviolable and permanent law. They must determine what is indeterminate, and from them in times of tumultuary agitation, in periods of popular commotion—from them only proceed permanence and regularity.

The arbitrary power of the judiciary, of which we hear so much, is a myth; for its power, though of necessity and by nature arbitrary in appearance, is in reality lodged in the Constitution itself. The courts cannot judge according to their own discretion, but only according to the written law, which alone invests them with authority. As compared with the other two branches of government, the peril that the judiciary will usurp its powers is extremely narrow. It is the centripetal force of government as opposed to the centrifugal tendency of the two other branches.

It is the Legislature which, besieged by special interests, and often obsessed by enthusiasm for political nostrums and haphazard or academic panaceas, has ever manifested a growing tendency to overleap constitutional barriers. In order, therefore, to give stability to the Constitution of the State, it is necessary, it is indispensably necessary, to restrain within proper and prescribed bounds the legislative authority; for this power which makes the laws can in a day also annihilate them. It is for the courts, therefore, to declare the organic law of the people as opposed to the temporary will of their legislative representatives; for the people, who alone initiate the laws, well knowing that the multitude cannot deliberate, have empowered the judicial department with the function of deciding what is the fundamental law of the land.

Upon the courts, which alone are placed above the ferment of political strife, hangs the safety of the people and the permanence of the nation; for if there were no power to intervene between unconstitutional enactment and inconsiderate execution, to curb the aggressions of the temporary depository of the public will and to prevent accumulations of privilege and accessions of class interest, the people would be enslaved, and this, too, while retaining the appearance of liberty or the form of republican government. It is well, then, to remember that the people have themselves prescribed the form and the rules of government, that it was they who demanded the separation of the government into three co-ordinate departments, that they alone have the power ultimately to declare what is constitutional.

When the Legislature virtually says, "We will make your Constitution," it is for the courts, as the embodiment of the national conscience and as the incarnation of the true and universal law of the land, to say in behalf of the people: "The power to make a Constitution is too sacred to be given to any delegated authority. We and we only, the people of this State and Nation, possess this power and this we shall not cease to maintain."

The Constitution is the perpetual edict of the sovereign people, and in this light only must it be interpreted. The construction of a statute, therefore, proceeds according to certain well-known principles. To insure that uniformity and regularity upon which the very existence of personal and political security depends, the scrupulous and accurate observance of legal forms is absolutely necessary. As was said by Cicero: "We have a civil law so constituted that a man becomes non-suited who has not proceeded in the manner he should have done." The jurisconsults of old had neither eyes nor ears for a cause unless the legal forms were complied with. It is well, too, that a judge should be subjected to certain rules besides those "of conscience and of nature"; for the very refinements and intricacies of legal procedure were in the main introduced to facilitate and to insure justice. While this may be evident to only those who have had some experience in the law, it is however plain to all that the courts, being denied recourse to force, can gain respect and submission only from the regularity of their proceedings, and the impartiality of their decisions.

It is thus through form and ceremony that we arrive at that uniformity which is the recognition of equality; and without such equality before the law there can be no justice. Every lawyer

knows that one deviation from established procedure may become a loophole of escape for future delinquents. It is for this reason that the courts are so jealous of precedent, not for the sake of self-emphasis, not for the perpetuation of their own dignity, but in the interests, it may be, of millions unborn. There is no judicial authority in the person; it is all in the law; not in the statute law, but in the Constitution which, as the foundation of the government, is anterior to all legislative enactment.

The United States Constitution, after which our State Constitutions are closely modeled, is the codification of the principles of Magna Charta, of the Petition of Right and of the Common Law of England. The Common Law itself was founded on immemorial custom, confirmed and regulated by the courts. The Constitution was a social compact; and with the object to insure a more perfect union of States, to promote the domestic welfare and to conserve for each individual that security of property, of person and of liberty, which men of our race have come to regard as their heritage, it has itself defined the co-ordinate and co-equal place of the judiciary in our scheme of government. And I think but few will contradict me when I affirm that this provision is the crowning glory of that noble instrument—the noblest, according to Gladstone, ever conceived and executed by man.

The Legislature is the place to try legal experiments. It labors in storm and stress and in the white heat of politics; the courts establish boundaries and repair the national fences. They deliberate in calm and investigate without interest; they neutralize, prevent and counteract the sporadic and the arbitrary. They form a lofty barrier to the incursions of the executive on the one hand, and to the usurpation of the legislative on the other—a stone wall which the trade winds of special interest and the tidal waves of spurious reform cannot beat down. It is well that a limitation be set before the executive; for however well meaning he be in personality every inroad he makes upon the established custom and the national law may become a dangerous instrument in the hands of an irresponsible successor. The narrow usurpation of to-day may become the wide breach through which the minions of tyranny may enter to-morrow. The executive and the legislative, chosen to effect the temporary will of the people, have power to repel foreign aggression and to preserve the domestic tranquillity. They may not, however, devise ways to accomplish the overthrow of established custom and of the assertors of law. To

decrease the power of the judiciary, therefore, is to augment the other branches; and, since the divided Legislature is more or less exposed to the bolder and more compact executive, the inevitable result would be the final exaltation of the latter at the expense of the people. It is thus apparent that upon the independence of the judiciary depends the continuance of the government.

The judiciary, as a separate, distinct, detached and independent function of government, is the last and crowning political growth of our Anglo-Saxon civilization. Evolved out of centuries of experience, invented by a continuing necessity, it took its place as our holy of holies, the conserver of our liberties, and the tribunal of ultimate appeal. It is a towering bulwark against the collective momentum of national perils.

I heard only recently the assertion that the courts have from time immemorial been opposed to progress and popular reform. I do not think this statement will bear analysis. According to DeLolme the prevalence of corruption in the Roman judiciary in the time of the Commonwealth, and the consequent immunity of the wealthy lawbreakers from punishment, was owing neither to the luxury which prevailed nor to national degeneracy, but to the nature of the government, which was altogether without effective checks and balances. As the people, who alone had power to check the continued aggressions of the executive, gave concession after concession to their masters, nothing but an independent judiciary to conserve the Constitution could have prevented their final absorption into the absolutism of the Cæsars.

In the history of England, it is true, it is not hard to find examples of corrupt and inefficient judges; but this was before the judiciary had attained a separate identity. Legal procedure is the evolution of argument from force, and the early English kings, bent upon strengthening the central government, could brook but few arguments. From the time of Edward I, the English Justinian, until the year of the great Reform Bill, the approach to justice was a very gradual one. To substitute for the initiative of the Crown the judgment of the courts was a task not to be accomplished in a century. Often, indeed, there was no redress for the people save in the arbitrament of arms.

The judges of that era sought in many ways to confer despotic authority on the Crown, of which they were the creatures; and this the people, jealous of their rights as confirmed by Magna Charta, could not permit. Had there been a detached judiciary

to counteract the overweighted executive, not only Wat Tyler's Rebellion in the reign of Edward III, but also the Civil War in the time of the Stuarts, would most probably never have occurred. The most potent cause of the parliamentary struggle against Charles I was the assumption by the king of the judicial authority in the Court of the Star Chamber. These and various cumulative attempts to regulate and to separate the judiciary, which was so long the mere instrument of the executive will, have at last resulted in such impartiality of justice that it is now universally conceded that English justice is without a parallel. Only when the executive was shorn of its dangerous prerogatives and when the autocrat was curbed by legislative and judicial bounds did English liberty become a fact. As long as the courts were subordinate to the Crown there could be no stability. And now, since the power of the English executive has been ascertained, defined and established by law, the rights of the people, as with us, are secure.

In this country there is even less cause for criticism of the judiciary. Before the Revolution the courts were sometimes dominated by the Crown. Since the adoption of the Constitution, however, which gave full scope to the judicial system, they have uniformly been characterized by integrity of conduct and impartiality of deliberation. Therefore, I cannot but believe that the prevailing misconception of the courts, and the widespread misapprehension of their function, is due to a lamentable ignorance of our judicial history. Else how shall we account for the growing demand that the courts follow the platform instead of precedent, that they substitute the ephemeral for the permanent, the local for the universal?

Respecting the Anglo-Saxon respect for property, the courts have ever recognized that liberty and property are inseparable. Life, liberty and property are therefore equally protected by the law. Our whole social structure being founded on property there must be uniformity and freedom in the acquisition and transmission of wealth. There must be no special privilege, no confiscation. This has required eternal vigilance on the part of the courts; and though the opinion seems to prevail that both liberty and property are subject to the *obiter dicta* of the judges, no student of our judicature can fail to see that nearly all matters involving the national welfare, submitted to their adjudication, have received that contemporaneous, uniform and practical construction which alone can conserve our society. Seldom, indeed, have they

failed to substitute principle for precedent, and to distinguish between the forces of obstruction and progress. If sometimes they have seemed too conservative it was because, face to face with the disintegrating tendencies of the hour, with ephemeral impulses and hysterical clamor, they were not able to forget that one bad precedent may trail a century of injustice. Their procedure, characterized by a lofty patriotism, by a constant disregard for criticism and by official consecration, has alienated the respect of only the unscrupulous and the unthinking.

Were this otherwise that first of publicists, the Hon. James Bryce, would not have been able in a recent address to say the following: "We may still speak of the law as being the common possession of the United States and England, because that spirit, those tendencies, those mental habits which belonged to English stock, when still undivided, have been preserved." That firm grasp on the rights of the individual citizen, and that recognition of the power of the State and of its executive to enforce the obedience of the citizen in all things save those legally secured to him; this, and that precision, exactness and definiteness, that deference to precedent and that respect for form, as well as that wise conservatism, that self-control and that capacity for change, when change means progress—all of which Mr. Bryce pronounced the characteristics of the English stock and of the Common Law—are still the ruling principles that govern our courts. Nor can it be truthfully said that these principles have failed to conserve the spirit of freedom, to safeguard the national character, which is the best security for law, and to insure justice and domestic peace.

It may not be amiss briefly to review the work of the courts in correcting corporate abuses. They have upheld the freedom of contract, have recognized the rights of patents, defined the rights, the equality, the privileges and the immunities of the citizen, and declared the limitations necessary to preserve the health and safety of employes. They have confirmed the rights of the States and determined the jurisdiction of the federal government. They have supported the State Legislatures and Congress in their successive attempts to regulate commerce and curb the incursions of monopoly.

By its decisions in the Trans-Missouri Freight Association and the Joint Traffic Association cases, as well as in the Addystone Pipe case, the Supreme Court upheld the Sherman Anti-Trust Law, which declared illegal every contract, combination and con-

spiracy in restraint of trade. To enumerate all of the decisions which declared that the government has the power to control the trusts and railroads is not necessary here. Sufficient to say that the courts have sustained the attempts to curb the Fertilizer Trust, Beef Trust, the Federal Salt Company and the Elevator Trust, affirmed the Texas Anti-Trust Law and caused the dissolution of the Paper Trust and of the Nome Retail Grocers Trust. The Northern Securities decision shows that the courts are one with the people in their desire to control those gigantic combinations of capital which threaten the prepetuity of the Republic.

In the last twenty years there have been thirty-six convictions and more than one hundred indictments under the Inter-State Commerce Law. The judiciary has not failed to sustain the government in its attempts to enforce the rights of homesteaders in the West; and it was the Supreme Court of the United States that restored to the City of Chicago franchises, fraudulently and surreptitiously obtained, to the value of a hundred million dollars, and that gave abutting owners in New York the right to collect damages from the elevated railroads.

Nor can it be said, therefore, that the courts are unfair to wealth. They are no respecters of persons, but, jealous for justice, they present a united front to preserve the Republic, to oppose special interests, privilege and monopoly, to restrain the triumphant militancy of the strong at the expense of the weak, to protect merit and industry wherever found, to encourage freedom of opportunity and to insist on a fair division and a proper apportionment of reward between labor and capital.

According to a recent writer, only twenty-one statutes and ordinances of Congress, from the beginning of the government to the present year, have been declared unconstitutional. In three of these cases the court pronounced an act of Congress invalid because it interfered with the rights of the citizen; in eight cases an act of Congress was declared unconstitutional because it interfered with the residuary powers of the States; in eight others Congress was found to have usurped the judicial power. The two others have since been overruled. Beside these nineteen federal laws the Supreme Court of the United States declared 103 State laws unconstitutional; and when we compare with these the 56 federal laws and the 279 State laws found valid, it must be admitted that there is little reason for criticism.

In the State of New York, wherein exists probably the most

complex civilization in the world, and where sometimes as many as 2,000 laws are passed by the Legislature in one year, the Court of Appeals between 1897 and 1903 determined 60 cases involving constitutional questions, an average of only 10 cases a year. In 26 of these cases, or less than half, the court decided against the validity of the legislative enactment. Most of these cases, moreover, involved the rights of the citizen, which had otherwise been sacrificed to legislative usurpation.

Though the courts are so often criticised for the performance of their function, we hear little save approval of the executive for the exercise of the veto power in his objection to legislative enactment. It is not for me to criticise the use of this function; yet it is interesting to note that while the Court of Appeals declares void an average of less than five laws a year, our present Governor, at the close of the last session of the Legislature, permitted 258 of the 448 bills left in his hands for consideration to fail for want of his signature. That the number of legislative enactments found objectionable and vetoed by the executive in one session is far greater than all of the statutes and enactments declared void for constitutional reasons by the Court of Appeals during the entire period of our history will doubtless surprise many.

It is sometimes forgotten that no law which is *per se* unconstitutional is the will of the people; that there may be an abuse of the legislative power; that out of the vast number of statutes enacted some are necessarily ill considered or poorly drawn; that there may be conformity to the letter of the Constitution with an inferential violation of its spirit; that not a session passes without some attempt at arbitrary or partial assertions of power in behalf of class legislation; that the court cannot brook the immunities and privileges of the few as against the many, and that a statute may, intentionally or unintentionally, transcend the legislative power.

It may not be amiss here as a vindication of the procedure of our judiciary to quote the words of one who, anticipating the many weaknesses of popular government, uttered what, in the light of the present, seems to be a prophecy: "All obstructions to the execution of the laws, all combinations and associations under whatever plausible character, with the real design to direct, control, counteract or awe the regular deliberation and action of the constituted authorities, are destructive to this fundamental principle, and a fatal tendency. They serve to organize faction, give

it an artificial and extraordinary force, to put in the place of the delegated will of the nation the will of party, often a small but artful and enterprising minority of the community; and according to the alternating triumphs of different parties, to make the public administration the mirror of the ill-concerted and incongruous projects of faction, rather than the organ of consistent and wholesome plans, digested by common counsels and modified by mutual interests." So spake Washington in his Farewell Address, and to-day when there is such a manifest tendency to merge the separate departments of government, and to transcend the limitations of the Constitution, his words sound like a rebuke.

To say that the separate functions of the executive, judicial and legislative branches of government are defined by the Constitution, which apportioned to each distinct and separate duties, is to state a truism, which, notwithstanding, it seems necessary to reaffirm constantly. Never has such re-affirmance been more needful than now, when from every quarter, from every party, comes a demand for innovation. I cannot foresee the outcome of the prevailing criticism, but it is not surprising, since without friction and change no nation may grow to maturity. Yet, as in human adolescence, there are sudden changes in government which are fraught with great danger to its existence.

It was in anticipation of this unceasing tendency to change that Washington uttered also in this same address this solemn warning: "Towards the preservation of your government and the permanency of your present happy state it is requisite, not only that you steadily discountenance irregular oppositions to its acknowledged authority, but also that you resist with care the spirit of innovation upon its principles, however specious the pretexts. * * * In all the changes to which you may be invited remember that time and habit are at least as necessary to fix the true character of governments as of other human institutions; that experience is the surest standard by which to test the real tendency of the existing constitution of a country; that facility in changes, upon the credit of mere hypothesis and opinion, exposes to perpetual change."

The very existence both of the veto and of the judicial function presupposes error in judgment, bias, or liability to mistake on the part of the representatives of the people. If, then, the use of the executive veto has so often been found necessary to protect the people from the unwisdom of the Legislature, is it not even

more important that in matters which the people have not seen fit to delegate to their representatives the court shall have power to declare what is and what is not constitutional? That a law should pass the Legislature does not necessarily imply that it is the will of the people, as that will is expressed by the Constitution; and whether the legislative power has been exercised within the limits which the people in their high sovereignty have themselves established is a question for the courts.

The courts have never sought to embarrass the Legislature or to defeat the will of the people. On the contrary, their decisions bear witness that they have uniformly defended the rights of the individual and the rights of property, that they have systematically developed limitations upon the judiciary and that they have tended to give the largest possible scope, within the bounds prescribed by the Constitution, to the legislative department. This is evidenced by the rule that if there be two constructions, one of which will render an act constitutional and the other void, that interpretation is to be chosen which gives force to the legislative mandate. Furthermore, whether a statute be unconstitutional in whole or in part is not to be considered unless it be unconstitutional in respect to some matter which directly concerns the party before the court. Though vested with the power to review legislative action, the courts are absolutely impotent until invoked by individuals or by corporations in defence of their rights. In the performance of their duties the judges neither misapply nor pervert the laws. Recognizing that this is a government of laws and not of men, they simply vindicate the organic law of the land, which was instituted to preserve the inalienable rights of life, liberty and the pursuit of happiness.

The courts have demonstrated by the continuity of their decisions that they are imbued with the spirit of the age. A thousand cases of the gravest import and character have been submitted to their deliberation. In these they have demonstrated judicial powers that have never been surpassed. Neither those triumphs of war nor those victories of peace of which we have so much reason to be proud have had greater influence than their decisions in the making, the extension and the conservation of the Union. The rights of the nation and of its component States, the rights of the individual as a man and as a citizen, the powers of the corporation, the sphere of commerce in our civilization, the status of the Indian and of the freedman: these and a thousand other questions of the

greatest consequence to the people have been judicially determined. It will be conceded, too, that the courts have not failed to recognize that consolidation is the order of the time, since to their fostering care the development of the doctrine of nationality, the expansion of commerce and the growth of national consciousness are largely due.

Can it be doubted that the separation of the legislative from the judicial power is a wise provision of the Constitution? And now, when it is gravely proposed to give to the law-enacting department of government also that guardianship of the Constitution hitherto entrusted to the judiciary, let us ponder these words of Washington in his Farewell Address, words never surpassed, splendid with the large accent of wisdom: "It is important, likewise, that the habits of thinking, in a free country, should inspire in those entrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one and thus to create, whatever the form of government, a real despotism. * * * The necessity of reciprocal checks in the exercise of political power by dividing and distributing it into different depositories, and constituting each the guardian of the public weal against invasion by the others, has been evidenced by experiments, ancient and modern. * * * Let there be no usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed."

The work of Marshall and his distinguished associates and successors needs no eloquent commendation. That work has resulted in a body of decisions which are and shall remain the bulwark of the rights of the people.

The judiciary, indeed, can have no more impressive vindication than the words of that great jurist, Stephen J. Field, of the United States Supreme Court, when, retiring after a service of thirty-five years, he addressed his associates as follows: "As I look back over more than a third of a century that I have sat upon this bench, I am more and more impressed with the immeasurable importance of this court. Now and then we hear it spoken of as an aristocratic feature of a Republican government. But it is the most democratic of all. Senators represent their States and Representatives their constituents, but this court stands for the whole

country and as such is truly 'of the people, by the people and for the people.' It has, indeed, no power to legislate. It cannot appropriate a dollar of money. It carries neither the purse nor the sword. But it possesses the power of declaring the law, and in that is found the safeguard which keeps the whole mighty fabric of government from rushing to destruction. This negative power, the power of resistance, is the only safety of a popular government."

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